आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
'' SMC" BENCH, AHMEDABAD

SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No. 356/AHD/2022**
निर्धारण वर्ष/Asstt. Year: 2013-2014

Sumit Chatterjee, 8, Aadit Bunglow, Thaltej Shilaji Road, Thaltej, Ahmedabad-380059. **PAN: AVBPC1243M**	Vs.	I.T.O, Ward-3(3)(5), Ahmedabad

(Applicant)		**(Respondent)**

Assessee by	:	Shri Soham U Mashruwala, A.R
Revenue by	:	Shri SanjayKumar, Sr. D.R

सुनवाई की तारीख**/Date of Hearing : 10/01/2023**
घोषणा की तारीख **/Date of Pronouncement: 06/04/2023**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax(Appeals), Ahmedabad, dated 14/07/2022 arising in the matter of penaltyh order passed under s.271(1)(c) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2013-14.

2. The assessee has raised the following grounds of appeal:

1. The learned CIT(A) has wrongly dismissed the appeal against the penalty order passed u/s. 271(1)(c) of the Income Tax Act for Rs. 1,92,717 which requires to be quashed and set aside.

2. That the A.O. has wrongly levied penalty of Rs. 1,92,717 u/s. 271(1)(c) of the Income Tax Act. The calculation of the demand as per the order passed under Sec 147 r.w.s Sec 143(3) is erroneous as the tax is considered as a payable at 30% on the addition made whereas based on the total income of the appellant tax payable would come to Rs.57,029/- and if at all penalty is being levied, the same may be restricted to Rs. 57,029 only. Hence, penalty worth Rs.1,92,717/- is required to be deleted.
3. That the C1T(A) has wrongly concluded to dismiss the appeal on basis of no response was given by the appellant during the course of assessment proceedings which is totally incorrect and baseless as all the reply to notices were filed with documentary proof. Hence penalty levied of Rs. 1,92,717 may be deleted.

4. That the appellant falls outside the tentacles of Sec 271(1)(c) and the explanations there under based on the facts of the case and a bonafide belief that the transaction of capital gains reported in the original return of income was genuine as the same is backed by bills and necessary documents. The appellant had no knowledge about modus operandi as detected by Department and purely to buy peace of mind, the appellant had not contested the order of re-assessment.

5. That the appellant had relied on various judgements filed with submission which are overlooked by CIT(A) in rejecting the appeal. The appellant relies on those judgements which should be taken into account and relief be granted.

6. That the appellant requests that he may be permitted to add, to alter to amend and/or to withdraw any of the Grounds of Appeal before the final hearing of the appeal.

3. The only issue raised by the assessee is that the learned CIT(A) erred in confirming the penalty levied by the AO for Rs. 1,92,717/- under the provisions of section 271(1)(c) of the Act on the charge of furnishing inaccurate particulars of income.

4. The facts in brief are that assessee in the present case is an individual. The assessee filed his return of income under section 139 of the Act dated 29.03.2014 declaring an income of ₹ 1,30,000/- only. The assessee in the return of income has shown long-term capital gain of ₹ 6,23,680/- which was claimed as exempted under section 10(38) of the Income tax Act 1961.

4.1 However, subsequently case of the assessee was reopened under income escaping assessment on the reasoning that the information form DDIT(Inv.) Unit-2(3) Kolkata was received regarding assessee being one of the beneficiaries of bogus long term capital racket in penny stock. The assessee in response to such

notice under section 148 of the Act, filed his return of income dated 30.06.2020 by treating the so-called long-term capital gain which was claimed as exempted under section 10(38) of the Act as income from other sources. As such the assessee has declared an income of Rs. 7,53,680/- in the return filed under section 148 of the Act which was accepted as it is by the revenue in the assessment framed under section 147 read with section 143(3) of the Act. Nevertheless, the AO was of the view that the income from other sources of Rs 6,23,680/- which was shown as exempted long-term capital gain by the assessee was discovered in pursuance to the initiation of the proceedings under section 147 of the Act. Accordingly, the AO initiated the penalty proceedings under section 271(1)(c) read with section 274 of the Act which came to be confirmed by the AO for Rs 1,92,717/- being 100% of the amount of tax sought to be evaded.

5. Aggrieved assessee preferred an appeal to the learned CIT(A) but there was no success to the assessee.

6. Being aggrieved by the order of the learned CIT(A) the assessee is in appeal before us.

7. The learned AR before us contended that there was addition made by the AO for the income shown in the income tax return. Therefore, there cannot be any penalty under section 271(1)(c) of the Act.

8. On the other hand, the learned DR submitted that the proceedings under section 147 of the Act were initiated based on the information received from the DDIT(Inv.) Kolkata. Had there not been any information about the undisclosed income of the assessee, the income of the assessee would have gone tax free.

9. Thus, the learned DR vehemently supported the order of the authorities below.

10. I have heard the rival contentions of both the parties and perused the materials available on record. It is the settled position of law that the penalty proceedings are independent and distinct to assessment proceedings/quantum proceeding. Any addition or disallowance made under quantum proceeding does not ipso facto empower the revenue authority to levy penalty under section 271(1)(c) of the Act. In the penalty proceeding, it must be proved by the revenue based on cogent material that the assessee has either concealed income or furnished inaccurate particulars of income. In holding so we draw support and guidance from the judgment of Hon'ble Supreme Court in case Reliance Petroproducts Pvt. Ltd. reported in 322 ITR 158 where it was held as under:

> *If we accept the contention of the revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature.*

10.1 Thus, it is transpired that whatever has been decided in the assessment proceedings cannot be a basis of levying the penalty under the provisions of section 271(1)(c) of the Act. In other words, the penalty proceedings being separate and independent, the assessee should be provided enough opportunity for his rebuttal on the allegations raised by the revenue. In simple words, the basis adopted during the assessment proceedings cannot be used in the penalty proceedings without following the due process. As such, to levy penalty under section 271(1)(c) of the Act, the revenue has to reach to unambiguous finding that the income assessed in the hand of the assessee represent actual income which has been either concealed or inaccurate particular has been furnished with regard to such income. In holding so, we draw support and guidance from the judgment of Hon'ble Gujarat High Court in the case of National Textiles vs. CIT reported in 249 ITR 125, the Hon'ble Gujarat High Court has held as under:

> *In order to justify the levy of penalty, 2 factors must co-exist, (i) there must be some material or circumstances leading to the reasonable conclusion that the amount does represent the assessee's income. It is not enough for the purpose of penalty that the amount has been assessed as income and (ii) the circumstances must show that there was animus, i.e., conscious concealment or act of furnishing of inaccurate particulars on the part of the assessee. The Explanation has no bearing on factor No. (i) but it has bearing only on factor No. (ii). The explanation does not make the assessment order conclusive evidence that the amount assessed was in fact the income of the assessee. No penalty can*

be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If an assessee gives an explanation which is unproved but not disproved, i.e., it is not accepted but circumstances do xnot lead to the reasonable and positive inference that the assessee's case is false, the Explanation cannot help the department because there will be no material to show that the amount in question was the income of the assessee.
Alternatively treating the Explanation as dealing with both the ingredients (i) and (ii) above, where the circumstances do not lead to the reasonable and positive inference that the assessee's explanation is false, the assessee must be held to have proved that there was no mens rea or guilty mind on his part. Even in this view of the matter, the Explanation alone cannot justify the levy of penalty. Absence of proof acceptable to the department cannot be equated with fraud or wilful default. As we find no material difference between the original Explanation 1 and Explanation 1 as substituted, in our opinion, it has to be so construed as to harmonise it with basic principles of justice and fairness, as in the case of original Explanation. We are guided by the commentaries of the learned authors Kanga & Palkhiwala Law and Practice of Income-tax Vol. 1. Pages 1637, 1639 to 1640.

10.2 Taking the guidance from the ratio laid down by the Hon'ble Gujarat High Court as discussed above, we hold that penalty cannot be imposed upon the assessee merely on the reasoning that a particular amount assessed as income in the hand the assessee.

10.3 Coming to the case on hand the assessee in the original return of income filed under section 139 of the Act claimed exempted long-term capital which has been withdrawn in the return filed in response to notice under section 148 of the Act and due taxes on the same was deposited. The returned income was accepted by the Revenue in the assessment order finalized under section 143(3) r.w.s. 147 of the Act without being any further addition/disallowances. Thus, question arises whether in such facts and circumstances penalty under section 271(1)(c) of the Act can be levied. The question has been answered by the coordinate bench of Chandigarh Tribunal in case of DCIT vs. Kulwant Sing reported in 104 taxmann.com 40 wherein it was held as under:

16. *A perusal of the above referred to section 271(1)(c) of the Act reveals that there are two parts of this section. The first part speaks about the charge which may invite penalty i.e. a person has concealed '**particulars**' of his income or furnished inaccurate particulars of income, he may be directed to pay certain sum by way of penalty as penalty. Now, the second part speaks about the quantum of amount payable. As per clause (iii), the Assessing officer may direct such a person against whom the above charge is established to pay in addition to the tax, if any, payable a sum which is not less than, but which shall not exceed three times, the amount of tax sought to the evaded by a reason of*

such concealment of particulars of income or furnishing of inaccurate particulars of income.

17. *Now, Explanation 1 strongly relied upon by the Ld. DR speaks about of deeming fiction regarding the concealment of particulars of income which speaks that if a person fails to offer an 'explanation' or which is found by the concerned income tax authorities to be false or such person could not substantiate in respect of any fact material to the computation of his total income, then the amount added or disallowed in computing total income of such person as a result thereof, shall be deemed to represent the income in respect of which particulars have been concealed. Further, as per the Explanation 3, where a person fails to furnish within the stipulated period his return of income for any assessment year and thereafter, the concerned income tax authority, either the Assessing officer or the CIT(A) finds that in respect of such assessment year, such person has taxable income, then such person shall be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after expiry of the period aforesaid in pursuance of a notice u/s 148 of the Act. Vide Explanation 4, the term "the amount of tax sought to be evaded" has been defined/explained for the purpose of computation of levy of penalty.*

18. *A per clause (a) to Explanation 4, where the amount of income tax in respect of which particulars have been concealed or inaccurate particulars of income have been furnished, has the effect of reducing the loss declared in the return or converting that loss into taxable income, then the tax sought to be evaded will the amount which would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars of income have been furnished had such income been the total income; meaning thereby there should be a resultant effect of reducing the loss declared or converting that loss into income by the act or omission of the concerned person for concealment of income or furnishing of inaccurate particulars of income. Then as per the clause (b) of Explanation 4, wherein, in a case to which Explanation 3 applies i.e., where the concerned person fails to file within the stipulated period a return of income despite having taxable income, in that case, the tax sought to be evaded will be the tax on the total income assessed but reduced by the amount of advance tax, tax deducted at source, tax collected at source and self-assessment tax paid before the issue of notice u/s 148 of the Act.*

As per the above said provision what is material is the evasion of the tax and in that scenario, if a person does not file a return and, hence, does not disclose his particulars of income and meaning thereby concealed his particulars of income but if he before the issuance of notice for the reopening of the assessment u/s 148 of the Act, had deposited due taxes and the resultant addition after assessment does not create any liability to pay any further tax, there will be no tax sought to be evaded.

19. *Now coming to the relevant clause (c) to Explanation 4, which is residuary clause which speaks that in any other case, the difference between the total income assessed and the tax that would have been chargeable, had such total income been reduced by the amount of income in respect of which particulars have been concealed which means that the tax payable on the income in respect of which particulars have been concealed or inaccurate particulars of income furnished.*

20. *A collective reading of all the three clauses reveal that for the calculation of the quantum of penalty, it is not the income in respect of which particulars have been concealed or furnished or inaccurate particulars of income furnished that is relevant but it is the resultant addition to the income of the assessee on account of such concealed particulars of income or furnishing of inaccurate particulars of income. If despite the*

*detection of concealment of income or furnishing of inaccurate particulars of income, in the resultant effect, there is no addition into the income of the assessee or the assessee has already paid taxes on such income in respect of which particulars have been concealed or inaccurate particulars of income have been furnished, then, as per Explanation 4, there will be no tax sought to be evaded and thereby no penalty will be leviable u/s 271(1)(c) of the Act. In our view, clause (c) to Explanation 4 is a residuary clause and can not be segregated and independently interpreted in divorce to clauses (a) or (b) of Explanation 4 to give giving it an entirely different meaning and any such an interpretation, will not be a correct interpretation of the statutory provision. A collective reading of the entire provisions of section 271(1)(c) of the Act reveal beyond doubt that what is material is the resultant addition to the taxable income of an assessee which may invite penalty under the relevant provisions of section 271(1)(c) of the Act. Though the words used in the first part, i.e. charging provision are '**Particulars**' of income, however, for levy of penalty it is not the '**Particulars**' of income but rather the 'quantum of income itself, that is added to the taxable income of the assessee is relevant for the purpose of calculation of the amount of penalty leviable as per the aforesaid provision. Explanation 4 to section 271(1)(c) was introduced vide Taxation Law Amendment Act, 1975. The relevant part of Circular No. 204 dated 24.7.1976 giving explanatory note on the aforesaid inserted provisions reads as under:—*

"61.11 New Explanation 4 defines 'the amount of tax sought to be evaded'. According to the definition, this expression will ordinarily mean the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed. In a case, however, where on setting off the concealed income against any loss incurred by the assessee under other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure, 'the tax sought to be evaded' will mean the tax chargeable on the concealed income as if it were the total income. Another exception to the general definition of the expression 'tax sought to be evaded' given earlier is a case to which Explanation 3 applies. Here, the tax sought to be evaded will be the tax chargeable on the entire total income assessed."

21. *Even in the Explanation 1, what is relevant is any fact material to computation of total income of any person regarding which such person fails to offer an '**Explanation**' or Explanation which is found to be false by the Income-tax authorities or an Explanation which is not able to substantiate, then, the amount added or disallowed in computing total income of such person as a result thereof deemed to represent the income in respect of which particulars have been concealed. So, firstly what is relevant is the material fact to the computation of total income. The word 'computation' here is relevant which means that the fact must be material which has the effect of any addition or disallowance in the income to be computed after the assessment proceedings and it has also been provided that the amount added or disallowed into the self-assessed income represents the income, particulars of which has been concealed and further a combined reading of the sub-sections (a), (b) and (c) and Explanation 4 would show that tax sought to be evaded is the tax payable on such amount in respect of which particulars have been concealed. The word '**Explanation**' here is not to be applied broadly to include explanation regarding each and every fact or particulars of income such as the source of income, manner of earning of income etc., rather, the word 'explanation' here has a limited scope, whereby, it has restricted that the offering of explanation that the material fact which had been detected by the Assessing officer has a result of addition of disallowance into the income of the assessee and the assessee has no explanation that why the same be not treated as taxable income of the assessee for that relevant year. The words 'particulars of income' though in general will have a wide and broader aspect as to of the relevant particulars such as the source of income, manner of earning of income and genuineness of*

transaction etc., however, the second part of this section 271(1)(c) of the Act has limited the above wider scope and for the purpose of computation of penalty, stress is given on the resultant addition of an amount to the income of the assessee. The tax thereupon represents the tax sought to be evaded and the penalty can be levied upon such concealed income equal to a sum which may be 100% of 300% of the amount of tax sought to be evaded.

10.4 Thus, in view of the above detailed discussion, we set aside the finding of the learned CIT(A) and direct the AO to delete the penalty levied by him under the provisions of section 271(1)(c) of the Act. Hence, the ground of appeal of the assessee is allowed.

11. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the Court on 06/04/2023 at Ahmedabad.

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

(True Copy)

Ahmedabad; Dated 06/04/2023
Manish